3-22-2017

State v. Williams Appellant's Brief Dckt. 44300

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44300**
Plaintiff-Respondent,	)	
	)	**ADA COUNTY NO. CR 2015-12724**
v.	)	
	)	
KENT GLEN WILLIAMS,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

_____

HONORABLE STEVEN J. HIPPLER
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

A jury found Kent Glen Williams guilty of two bank robberies, use of a firearm in the commission of one of the robberies, and unlawful possession of a firearm. Mr. Williams raises two issues on appeal. First, he argues the district court abused its discretion by denying his motion to sever the bank robbery charges due to the joinder's prejudicial effect. Second, he contends the prosecutor committed misconduct in closing argument, which amounted to fundamental error. In light of these errors, Mr. Williams respectfully requests this Court vacate the district court's judgment of conviction and remand this case for further proceedings.

Statement of Facts and Course of Proceedings

In September of 2015, the grand jury returned a true bill indicting Mr. Williams on one count of robbery, in violation of I.C. § 18-6501. (R., pp.32–33.) Mr. Williams allegedly robbed a Key Bank on April 14, 2015. (R., p.32.) The same day, the grand jury returned another true bill with an Amended Indictment, charging Mr. Williams with three additional offenses for unlawful possession of a firearm, in violation of I.C. § 18-3316, possession of a controlled substance, and possession of drug paraphernalia. (R., pp.35–36.) Mr. Williams entered a plea of not guilty, and the district court set the trial for late February of 2016. (R., p.49.) The State later filed an Information Part II alleging Mr. Williams was a persistent violator of the law under I.C. § 19-2514 due to

two prior felony convictions. (R., pp.62–63; Tr. Vol. I,[1] p.1, L.1–p.8, L.15 (arraignment on persistent violator).)

Then, almost four months after the Amended Indictment and about a month and one-half before trial, the grand jury returned a Second Amended Indictment. (R., pp.87–88.) In this indictment, Mr. Williams was charged with the April bank robbery (Count 1) and unlawful possession of a firearm (Count 2), plus two new offenses for a second robbery of a Key Bank on July 22, 2015 (Count 3), and the use of a handgun during the commission of the July robbery (Count 4), in violation of I.C. § 19-2520. (R., pp.87–88.)

Mr. Williams then filed a motion for relief from prejudicial joinder.[2] (R., pp.122–29.) He asserted Counts 1 and 2 should be severed from Counts 3 and 4 and later that only Count 1 should be severed from Counts 2, 3, and 4. (R., pp.122, 129; Tr. Vol. I, p.46, Ls.3–6.) Among other arguments, Mr. Williams argued trying the two robbery charges together would unfairly prejudice him because the jury would find him guilty of the July robbery based on criminal propensity. (R., pp.125–29.) The district court held a hearing on the motion, took the matter under advisement, and subsequently issued an oral ruling. (S*ee generally* Tr. Vol. II; Tr. Vol. I, p.49, L.22–p.64, L.13). The district court reasoned that evidence of one robbery would be admissible in the trial of the other as evidence of identity and a common scheme or plan under Idaho Rule of Evidence

[1] There are three transcripts on appeal. The first, cited as Volume I, contains various pre-trial hearings held on November 30, 2015, January 15, 2016, February 1, 2016, and March 11, 2016, the jury trial held from March 28 to March 30, 2016, and post-trial hearings held on May 6, 2016, and May 23, 2016. The second, cited as Volume II, contains a hearing on Mr. Williams's motion to sever, held on January 29, 2016. The third, cited as Volume III, contains a hearing on Mr. Williams's motion regarding excessive restraints, held on February 5, 2016.

[2] This was Mr. Williams's second motion for relief from prejudicial joinder. His first motion was withdrawn. (R., pp.75–78; Tr. Vol. I, p.9, Ls.17–22.)

("I.R.E.") 404(b). (Tr. Vol. I, p.52, L.17–p.64, L.12.) The district court denied Mr. Williams's motion to sever the charges. (Tr. Vol. I, p.64, L.13.)

Mr. Williams proceeded to trial. (Tr. Vol. I, p.232, L.16–p.832, L.3.) Just prior to trial, the parties stipulated to the filing of an Amended Information, which renumbered the counts so the April robbery (Count 1), the July robbery (now Count 2), and the use of a firearm in the commission of the July robbery (now Count 3) would be tried in Part 1 of the trial and the unlawful possession of the firearm (now Count 4) and the persistent violator enhancement would be tried in Part 2. (R., pp.314–15; Tr. Vol. I, p.185, L.20–p.204, L.20.) After Part 1 of the trial, the jury returned a guilty verdict on Counts 1, 2, and 3. (Tr. Vol. I, p.836, L.19–p.837, L.19; R., pp.372–73.) The district court immediately proceeded to Part 2 of the trial. (Tr. Vol. I, p.837, L.20–p.868, L.7.) The jury returned a guilty verdict on Count 4 as well as the persistent violator enhancement. (Tr. Vol. I, p.869, L.8–p.871, L.16; R., p.374.)

The district court sentenced Mr. Williams to life imprisonment, with twelve years fixed, for the April robbery, and life imprisonment, with twenty years fixed, for the July robbery with the use of a firearm, to be served consecutively. (R., p.395; Tr. Vol. I, p.913, Ls.1–13.) For unlawful possession of a firearm, the district court sentenced Mr. Williams to five years fixed, to be served consecutive to the April robbery sentence and concurrent with the July robbery sentence. (R., p.363; Tr. Vol. I, p.913, Ls.14–17.) Thus, Mr. Williams's aggregate sentence was life in prison, with thirty-two years fixed.

Mr. Williams filed a timely Notice of Appeal from the district court's Judgment of Conviction and Commitment. (R., pp.399–402.)

ISSUES

I. Did the district court abuse its discretion by denying Mr. Williams's motion for relief from the prejudicial joinder of both bank robbery charges?

II. Did the prosecutor commit misconduct by disparaging defense counsel and vouching for the police during closing arguments?

ARGUMENT

I.

The District Court Abused Its Discretion When It Denied Mr. Williams's Motion For Relief From The Prejudicial Joinder Of Both Bank Robbery Charges

A. Introduction

Mr. Williams asserts the district court abused its discretion by denying his motion for relief from prejudicial joinder because the jury could have found Mr. Williams guilty of the April robbery and then found him guilty of the July robbery based solely on criminal disposition. If tried separately, the evidence of one robbery would not be admissible in the trial of the other. Therefore, the district court should have granted Mr. Williams's motion and severed the two robbery charges to prevent any unfair prejudice.

B. Standard Of Review

The district court's denial of a motion to sever is reviewed "under an abuse of discretion standard." *State v. Orellana-Castro*, 158 Idaho 757, 760 (2015).

> When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason.

State v. Diaz, 158 Idaho 629, 634 (Ct. App. 2015).

C. The District Court Abused Its Discretion By Not Severing The Joinder Of The Two Bank Robbery Charges Because Evidence Of One Robbery Would Not Be Admissible In The Trial Of The Other

Idaho Criminal Rule ("I.C.R.") 8 permits the State to charge two or more offenses in the same complaint, indictment, or information as separate counts if the offenses "are

based on the same act or transaction or on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan." I.C.R. 8. Even if properly joined, "the defendant may obtain relief from the joinder . . . by showing that joinder will result in unfair prejudice." *State v. Wilske*, 158 Idaho 643, 644–45 (Ct. App. 2015).

I.C.R. 14 governs relief from prejudicial joinder. It states in relevant part:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in a complaint, indictment or information or by such joinder for trial together, the court may order the state to elect between counts, grant separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires.

I.C.R. 14. "An abuse of discretion standard is applied when reviewing the denial of a motion to sever joinder pursuant to I.C.R. 14, which presumes that joinder was proper in the first place."[3] *Diaz*, 158 Idaho at 634 (citing *State v. Field*, 144 Idaho 559, 564–65 (2007)). With respect to joinder, and it stands to reason with severance as well, its propriety "is 'determined by what is alleged, not what the proof eventually shows.'" *Field*, 144 Idaho at 565 (quoting *State v. Cochran*, 97 Idaho 71, 73 (1975)).

When reviewing the denial of a severance motion, "the inquiry on appeal is whether the defendant has presented facts demonstrating that unfair prejudice resulted from a joint trial." *State v. Blake*, 161 Idaho 33, 35 (Ct. App. 2016). The Idaho appellate courts have identified three potential sources of prejudice:

> (1) the jury may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either if it

[3] In district court, Mr. Williams moved for relief from the prejudicial joinder; he did not argue the joinder itself was improper. (R., pp.122–29.) The district court, however, discussed whether the initial joinder was proper in its oral ruling on Mr. Williams's motion. (Tr. Vol. I, p.52, L.12–p.59, L.11.) While not conceding the issue, Mr. Williams limits his argument on appeal to the severance issue raised in his motion below.

> could keep the evidence properly segregated; (2) the defendant may be confounded in presenting defenses, as where he desires to assert his privilege against self-incrimination with respect to one crime but not the other; or (3) the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition.

Wilske, 158 Idaho at 645 (quoting *State v. Abel*, 104 Idaho 865, 867–68 (1983)). "The defendant has the burden of showing such prejudice." *Blake*, 161 Idaho at 35.

In this case, the third source of prejudice is at issue. As is the case here, "the alleged prejudice is often that evidence of the defendant's conduct which would be admissible in the prosecution of one offense would not be admissible under [I.R.E.] 404(b) in the prosecution of the other offense if it were tried separately." *Orellana-Castro*, 158 Idaho at 760. The risk is that the jury will reach a guilty verdict on the basis that the defendant "is a bad person." *Abel*, 104 Idaho at 868. However, "showing that evidence regarding one offense could not be admitted in a separate trial on the other offense does not ipso facto establish that severance is required." *Wilske*, 158 Idaho at 46. In some cases, "[e]ven if some part of the evidence of either of the incidents were inadmissible in a separate trial," the evidence for each offense may be "simple and distinct," and therefore severance is not required. *Abel*, 104 Idaho at 870. Thus, "the ultimate question is whether the evidence of multiple offenses in a joint trial was unfairly prejudicial to the defendant with respect to any of the individual charges." *Wilske*, 158 Idaho at 645.

In reviewing the third source of prejudice, the Court "looks at the evidence of the separate counts to determine whether, if the counts had been tried separately, the separate evidence could have been admitted in the separate trials." *Diaz*, 158 Idaho at 634. Under I.R.E. 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

I.R.E. 404(b). The prohibition on other crimes evidence "has its source in the common law. The common law rule was that the doing of a criminal act, not part of the issue, is not admissible as evidence of the doing of the criminal act charged." *State v. Grist*, 147 Idaho 49, 52 (2009) (internal quotation marks and citation omitted).

The Court applies to two-part standard when reviewing the district court's admission of other crimes evidence. *State v. Ehrlick*, 158 Idaho 900, 913 (2015). First, "whether, under I.R.E. 404(b), the evidence is relevant as a matter of law to an issue other than the defendant's character or criminal propensity," and second, "whether, under I.R.E. 403, the district court abused its discretion in finding the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice to the defendant." *Id.* (quoting *State v. Joy*, 155 Idaho 1, 8 (2013)). "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *State v. Sheldon*, 145 Idaho 225, 228 (2007) (quoting I.R.E. 401).

In this case, the evidence of one robbery would not be admissible pursuant to I.R.E. 404(b) in the trial of the other. Other crimes evidence "should only be admitted if 'relevant to prove . . . a common scheme or plan embracing the commission of two or more crimes *so related to each other* that proof of one tends to establish the other, knowledge, identity, or absence of mistake or accident.'" *State v. Pepcorn*, 152 Idaho 678, 689 (2012) (emphasis added) (quoting *State v. Johnson*, 148 Idaho 664, 668

(2010)); *see also Orellana-Castro*, 158 Idaho at 762 ("a common scheme or plan must embrace the commission of two or more crimes *so related to each other* that proof of one tends to establish the other"). The Court has cautioned that "trial courts must carefully scrutinize evidence offered as 'corroboration' or as demonstrating a 'common scheme or plan' in order to avoid the erroneous introduction of evidence that is merely probative of the defendant's propensity to engage in criminal behavior." *Grist*, 147 Idaho at 53. Here, the evidence of the April and July robberies are not so related that the facts of one establish Mr. Williams as the perpetrator of the other. As found by the district court, the similarities between the two robberies were: (1) the robberies occurred approximately three months apart; (2) both banks were Boise branches of Key Bank; and (3) both banks were robbed shortly after the bank opened. (Tr. Vol., p.54, Ls.16–19, Ls.22–24; Tr. Vol. II, p.32, Ls.8–14.) The similarities between the perpetrators were: (1) both were identified as a white male between 5'8" and just over 6" tall; (2) both were wearing a dark-billed cap with a long sleeve jacket; (3) both wore similar mirrored aviator-style sunglasses; (4) both wore a handkerchief over the mouth and nose; (5) the jacket and handkerchief in each robbery were color-coordinated; (6) both perpetrators, appearing to have knowledge of the bank, demanded money from two teller drawers out of view of bank customers; (7) both demanded 20s, 50s, and 100s; (8) both demanded no dye, bait, or tracker bills; and (9) both quickly identified the tracker bill[4] in each robbery. (Tr. Vol. I, p.54, L.19–p.57, L.3; Tr. Vol. II, p.32, L.15–p.37, L.6, p.37, Ls.15–21.) With regard to the handkerchief, it was easily pulled over the perpetrator's face in the April robbery, which indicated to the district court "some sort of binding system in the

[4] A tracker bill feels thicker than a regular bill. (Tr. Vol. II, p.36, Ls.11–20.)

back" to keep it together. (Tr. Vol. I, p.55, Ls.10–13; Tr. Vol. II, p.34, Ls.5–22.) In the July robbery, one of the bank tellers observed a hand-sewn elastic band on the back of the handkerchief. (Tr. Vol. I, p.55, Ls.13–17; Tr. Vol. II, p.34, Ls.5–22.) These facts, taken as a whole, are not distinctive or remarkable. An early morning bank robbery committed by an average white male with a disguise and some knowledge of teller drawers and tracking bills is not so unusual that it tends to identify the individual of the prior robbery. Rather, these facts are common components of bank robberies. *See State v. Sanchez*, Nos. 43293, 43294, 2017 Opinion No. 16S, at pp.6–7 (Ct. App. Feb. 27, 2017) (holding the defendant's opportunistic tendency to abuse young female children in his care was "unfortunately entirely unremarkable in sexual abuse cases" and did not show a common scheme or plan). Moreover, a key distinction between the two robberies casts doubt on the commonalities—in the April robbery, the perpetrator did not display a weapon; in the July robbery, the perpetrator showed the tellers a handgun in his waistband. (Tr. Vol. I, p.56, Ls.12–14; Tr. Vol. II, p.36, L.24–p.37, L.3.) This difference sets apart the two robberies. Thus, the evidence of one robbery was not relevant to any enumerated purpose under I.R.E. 404(b) because the evidence fails to show a common scheme or plan in order to establish identity.

Even if the evidence of one robbery was admissible in the trial of the other under I.R.E. 404(b), the danger of unfair prejudice substantially outweighed any probative value. *See* I.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .").

> The prejudicial effect of [character evidence] is that it induces the jury to believe the accused is more likely to have committed the crime on trial because he is a man of criminal character. Character evidence, therefore, takes the jury away from their primary consideration of the guilt or

> innocence of the particular crime on trial. The drafters of I.R.E. 404(b) were careful to guard against the admission of evidence that would unduly prejudice the defendant, while still allowing the prosecution to present probative evidence.

Grist, 147 Idaho at 52. First, when examining the prejudicial effect of the April robbery evidence against the July robbery, it is critical to recognize that most of the evidence identifying Mr. Williams as the perpetrator of the July robbery stemmed from the evidence of the April robbery. In the April robbery, the police were able to identify the getaway car and connect that car to Mr. Williams. (Tr. Vol. I, p.56, L.14–p.57, L.13; Tr. Vol. II, p.38, Ls.3–22, p.39, Ls.5–11.) In the April robbery, the police observed a bump on the perpetrator's hand from the bank's surveillance video and then observed a similar bump on Mr. Williams's hand. (Tr. Vol. I, p.57, L.14–21; Tr. Vol. II, p.38, L.23–p.39, L.4.) No getaway car was observed in July robbery. No videos showed a bump on the perpetrator's hand in the July robbery. Unlike the getaway car or the hand marking, there was nothing from the July robbery itself to identify Mr. Williams as the perpetrator.[5] Thus, the identification of Mr. Williams as the perpetrator of the July robbery was dependent on his identification as the perpetrator of the April robbery. Despite any probative value in the April robbery to identify Mr. Williams, the "overwhelming effect" of

[5] During the execution of a search warrant after the July robbery, the police found a handgun in Mr. Williams's motel room that the district court found was similar to the gun used in the July robbery. (Tr. Vol. I, p.58, Ls.6–8.) This is the only independent evidence to support an identification of Mr. Williams as the perpetrator of the July robbery. In addition, the police found two other sets of matching long-sleeved shirts and handkerchiefs, as well as sewing materials and aviator sunglasses. (Tr. Vol. I, p.57, L.22–p.58, L.6, p.58, Ls.13–15; Tr. Vol. II, p.37, L.11–p.38, L.2.) The police also found $7,000 in one hundred dollar bills, some of them sequential, but none were recorded, tracker, or bait bills. (Tr. Vol. I, p.58, Ls.8–13; Tr. Vol. II, p.37, Ls.7–10.) These items, however, are not more attributable to one robbery than the other. These items do not affirmatively show that Mr. Williams committed *both* robberies.

the evidence would have emphasized Mr. Williams's propensity to rob banks and thus induce the jury to find Mr. Williams's guilty of the July robbery. *Sanchez*, 2017 Opinion No. 16S, at p.9. Put another way, lacking identification evidence from the July robbery itself, there was a substantial risk the jury would find Mr. Williams robbed the bank in July because he did it a few months earlier in April. *Grist*, 147 Idaho at 54.

Second, looking at prejudicial effect of the July robbery evidence against the April robbery, the probative value of the July robbery evidence to show Mr. Williams committed April robbery is minimal to nonexistent. Again, the July robbery itself offered no independent identification evidence. As such, the evidence of the July robbery in the trial of the April robbery amounts to pure propensity evidence—because Mr. Williams committed a bank robbery in July, he must have committed one a few months earlier. Any probative value in the July robbery evidence is substantially outweighed by the danger of unfair prejudice. The prejudicial effect of the July robbery is further magnified by the use of a firearm in the July robbery. The prejudice to Mr. Williams from the jury learning he has not only a criminal propensity to commit bank robberies, but also a disposition to use a gun is self-evident.

In summary, the district court abused its discretion by denying Mr. Williams's motion to sever the robbery charges by failing to act consistently with the legal standards and failing to reach its decision by an exercise of reason. As a matter of law, the evidence of one robbery was not admissible in the trial of the other, and therefore the district court did not apply the correct legal standards in ruling otherwise. Further, for either robbery charge, any probative value in the evidence of one robbery in the trial of the other is substantially outweighed by the danger of unfair prejudice, and thus the

district court did not exercise reason in its weighing decision. Finally, the State cannot meet its burden to show that the district court's failure to sever the robbery charges was harmless. *See Orellana-Castro*, 158 Idaho at 762–63; *Sanchez*, 2017 Opinion No. 16S, at pp.6–10. Because the district court abused its discretion by denying Mr. Williams's motion for relief from prejudicial joinder, this Court should vacate his judgement of conviction, reverse the district court's order denying severance, and remand this case for new, separate trials on each robbery charge.

II.

The Prosecutor Committed Misconduct By Disparaging Defense Counsel And Vouching For The Police During Closing Arguments

A. Introduction

In the prosecutor's rebuttal closing argument, the prosecutor disparaged defense counsel by describing his opening statement as containing ludicrous allegations that were offensive to him and the police. The prosecutor also informed the jury that the police did "good police work" and "a fine job" and the police's testimony was the truth. Mr. Williams contends the prosecutor's statements were improper and thus deprived him of his right to fair trial.

B. Standard Of Review

If the prosecutorial misconduct was not objected to at trial, the Court applies the fundamental error standard:

> Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not

> contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless.

State v. Perry, 150 Idaho 209, 227–28 (2010). To show the error was not harmless, the defendant must prove "there is a reasonable possibility that the error affected the outcome of the trial." *Id.* at 226.

C. The Prosecutor's Comments Disparaging Defense Counsel And Vouching For The Police Amounted To Fundamental Error

"'Every person accused of [a] crime in Idaho has the right to a fair and impartial trial,' *State v. Sharp,* 101 Idaho 498, 504 (1980), 'whether guilty or innocent,' *State v. Fowler,* 13 Idaho 317, 325 (1907)." *State v. Skunkcap*, 157 Idaho 221, 234 (2014). This Court "long ago held, 'It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury.'" *Id.* (quoting *State v. Irwin,* 9 Idaho 35, 44 (1903)). "Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial." *Perry*, 150 Idaho at 227. "To constitute a due process violation, the prosecutorial misconduct must result in the denial of the defendant's right to a fair trial." *State v. Jimenez*, 159 Idaho 466, 472 (Ct. App. 2015).

"Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case." *State v. Moses*, 156 Idaho 855, 868 (2014) (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)).

> Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints the evidence and the inferences to be drawn therefrom."

> *State v. Sheahan,* 139 Idaho 267, 280 (2003). "Considerable latitude, however, has its limits, both in matters expressly stated and those implied." *State v. Phillips,* 144 Idaho 82, 86 (Ct. App. 2007).

Moses, 156 Idaho at 868. Whether the prosecutor's closing argument exceeds those limits and "rise[s] to the level of fundamental error is a question that must be analyzed in the context of the trial as a whole." *State v. Carson*, 151 Idaho 713, 718 (2011). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* at 718–19 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

"It is well established that a prosecutor commits misconduct if he or she uses inflammatory tactics to appeal to the emotion, passion or prejudice of the jury." *State v. Contreras-Gonzales*, 146 Idaho 41, 48 (Ct. App. 2008).

> A prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial.

State v. Gross, 146 Idaho 15, 19 (Ct. App. 2008). Thus, it is misconduct for the prosecutor to express personal opinions and beliefs about the credibility of a witness. *State v. Wheeler*, 149 Idaho 364, 369 (Ct. App. 2010). "A prosecutor can improperly vouch for a witness by placing the prestige of the state behind the witness or referring to information not given to the jury that supports the witness." *Id.* at 368. "Likewise, it is misconduct for the prosecution to make personal attacks on defense counsel in closing argument." *Sheahan*, 139 Idaho at 280 (citing *State v. Page*, 135 Idaho 214, 223 (2000); *United States v. Young*, 470 U.S. 1, 9 & n.7 (1985)).

In this case, Mr. Williams contends the prosecutor committed misconduct during closing argument by disparaging defense counsel, interjecting personal beliefs, and personally vouching for the police's credibility. Mr. Williams did not object to the misconduct at trial, so he must show fundamental error on appeal. In light of the prejudicial and inflammatory nature of the prosecutor's remarks, Mr. Williams has met this standard.

First, the prosecutor's statements rise to the level of misconduct and thus violated Mr. William's unwaived constitutional right to a fair trial. During rebuttal closing argument, the prosecutor read to the jury the instruction that informs them arguments and statements by lawyers are not evidence. (Tr. Vol. I, p.814, L.19–p.815, L.19; *see also* R., p.347 (Instruction No. 11).) The prosecutor then argued:

> And, so, frankly, I'm telling you is [sic] you're not to rely upon even what I'm saying to you. This is argument, this is to help you understand what the evidence means. So when you hear in opening – the only reasoning [sic] I bring this up is because *it's true that defense counsel in opening statement made some allegations, frankly, it rose to the level, in my view, of allegations,* and I have to address them, I think, because the evidence does not support the *allegation* that was made. And I am speaking specifically about the *allegation* that – again, I'll call it the *allegation* – that this evidence, the gun was planted in his hotel room. You recall that.[6]
>
> Well, we were very careful, we asked all the witnesses could this happen? No. Did it happen, did you do that? No.

[6] Notably, defense counsel did not make this "allegation" in his opening statement or closing argument. Rather, defense counsel stated in his opening statement that Mr. Williams would testify and tell the jury "adamantly, without a doubt, he does not possess a firearm, ammunition, holster, clips or anything associated with these guns." (Tr. Vol. I, p.383, Ls.17–19.) This is simply a general statement that Mr. Williams would deny possession, which is far different than a statement that the police planted the gun in Mr. Williams's motel room. In closing argument, defense counsel made absolutely no comments about the police planting the gun. In fact, defense counsel made the opposite comment that Mr. Williams had a gun in his possession. (Tr. Vol. I, p.806, Ls.23–25.)

(Tr. Vol. I, p.815, L.20–p.816, L.10.) The prosecutor went on to characterize defense counsel's "allegation" as "ludicrous" and "offensive" to him and the police:

> Now, ladies and gentlemen, that didn't happen, the firearm was not planted in the defendant's hotel room. And *the allegation – you know, I say it rises to the level of an allegation* – that somehow the defendant simply fits the profile of the right kind of guy that you can pin this on, *well, that is ludicrous,* and I'll tell you why. . . .
>
> *I'll tell you what else is ludicrous*, because there's tons of evidence, and my partner went through all that evidence that shows you Mr. Williams was the robber of those two banks. If the police were going to go and pin something on some guy, just pick him out of random because he happens to be – he could potentially be the kind of guy we see on the surveillance videos, white male, roughly that build, yeah, let's pick him because he happens to be in a cheap motel.[7]
>
> *First of all, that's offensive to me, to law enforcement*. But think about what that means. . . . *The truth is that's not what happened ladies and gentlemen. What happened is exactly what they testified to.* These things were legitimately found in the defendant's possession. And *so I apologize, and I'm a little bit amped up about that, but it's because it's offensive to me about law enforcement,* that the implication be raised that, hey, it's on them.

(Tr. Vol. I, p.816, L.16–p.818, L.8.) Immediately after describing himself as "amped up" and offended by defense counsel, the prosecutor told the jury: "*This is a case of good police work. The police did a fine job here. And in fact, because of their good police work we were able to solve this case.*" (Tr. Vol. I, p.818, Ls.9–11.)

Taken individually or as a whole, the prosecutor's statements were improper, thus depriving Mr. Williams of his right to fair trial. First, the prosecutor disparaged

[7] Defense counsel said in his opening statement, "Kent is the type of person that it's very easy to pin these things on," and he explained that Mr. Williams is homeless, has all his possessions and money in his car, and travels around the Northwest from one cheap motel to another. (Tr. Vol. I, p.380, Ls.17–22.) Defense counsel also argued that the police were operating on an assumption that the perpetrator of the April robbery and July robbery were the same individual. (Tr. Vol. I, p.380, L.3–p.382, L.23.) Defense counsel made similar remarks in closing, explaining that the police assumed the two robberies were committed by the same individual and "then later trying to pin them on Kent Williams." (Tr. Vol. I, p.802, L.17–p.803, L.7.)

defense counsel by labeling his opening and closing remarks as ludicrous allegations. Second, the prosecutor interjected his personal beliefs by informing the jury that he was offended—personally and on law enforcement's behalf—by defense counsel's actions in defending his client. Indeed, the prosecutor was so "amped up" that he felt the need to apologize to the jury. Third, the prosecutor vouched for the police's credibility by telling the jury that the "truth" was "exactly" what was said by the police. Finally, the prosecutor further vouched for the police, placing the State's prestige behind them, by telling the jury that this case was an example of "good police work," "a fine job," and, again, "good police work," which allowed them to solve the case. These statements were calculated to inflame the juror's minds and arouse prejudice or passion against the defendant. "[A]ppeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible." *State v. Parker*, 157 Idaho 132, 146 (2014) (quoting *State v. Ellington*, 151 Idaho 53, 62 (2011)). In light of the inflammatory, prejudicial statements by the prosecutor, Mr. Williams has shown a violation of his unwaived constitutional right to a fair trial. *Perry*, 150 Idaho at 227.

Second, the error is clear and plain from the record. It is well-established that a prosecutor cannot disparage defense counsel, interject personal beliefs, or vouch for credibility. *See, e.g.*, *Sheahan*, 139 Idaho at 280; *Gross*, 146 Idaho at 19; *Contreras-Gonzales*, 146 Idaho at 48. There is no plausible strategic or tactical reason why defense counsel would chose not to object to the prosecutor's argument. The prosecutor's argument informed the jury that any defense was a ludicrous allegation, so offensive to the State and the police, that the prosecutor could not help but comment on it. This argument's purpose was to inflame the jurors' minds and appeal to their

emotion, passion, and prejudice. Mr. Williams asserts he has met his burden to show the error plainly exists.

Finally, this error was not harmless. By using inflammatory tactics to appeal to the jury's passion and prejudice, the prosecutor attempted to secure a verdict on factors other than the law and the evidence admitted a trial. *Perry*, 150 Idaho at 227. The evidence Mr. Williams committed the two robberies was circumstantial and, further, a finding Mr. Williams committed the July robbery relied heavily on a finding the Mr. Williams committed the April robbery. These tactics by the prosecutor encouraged the jury to set aside any doubt as whether Mr. Williams committed one robbery but not the other and to consider the State's and police's version of events to be true. Mr. Williams submits he has met his burden to show there is a reasonable possibility the prosecutorial misconduct affected the outcome of trial. *Perry*, 150 Idaho at 226.

CONCLUSION

Due to the prejudicial joinder, Mr. Williams respectfully requests that this Court vacate his judgement of conviction, vacate the district court's order denying severance, and remand this case to the district court with instructions to sever the charges for separate trials. Alternatively, due to the prosecutorial misconduct, Mr. Williams respectfully requests that this Court vacate his judgment of conviction and remand this case for a new trial.

DATED this 22nd day of March, 2017.

_____/s/_____
JENNY C. SWINFORD
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of March, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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STEVEN J HIPPLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

JCS/eas